

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Schools and Libraries Universal Service)	
Support Mechanism)	CC Docket No. 02-6
)	
)	

COMMENTS OF SBC COMMUNICATIONS INC.

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	1
II.	BACKGROUND.....	2
III.	DISCUSSION.....	3
	A. The Existing Procedures are Inequitable and Should be Changed.....	3
	B. The Commission Should Adopt a Comprehensive Plan for Recovering Improperly Disbursed Funds.....	5
	C. The Commission Cannot Seek Recovery of More Than Amounts Incorrectly Disbursed.....	9
IV.	CONCLUSION.....	10

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I. INTRODUCTION AND SUMMARY

SBC welcomes the Commission's decision to review its rules and procedures for the schools and libraries universal service support mechanism (*i.e.*, e-rate program) to ensure that the program operates in an efficient, effective, and fair manner, while preventing waste, fraud and abuse. Although the existing rules generally have been successful in meeting these goals, changes are necessary. In particular, the Commission should modify its existing rules and procedures regarding the recovery of funding erroneously committed to applicants, which require USAC to recover funds erroneously disbursed only from service providers (even where the service provider complied fully with the program rules). These rules are inequitable and inefficient, and discourage service providers from bidding on e-rate projects, contrary to the objectives of the e-rate program.

The Commission can and should develop a new, comprehensive plan for the recovery of funds erroneously or improperly disbursed that focuses on the party (or parties) that are responsible for, or benefited from, the disbursement.² This change will promote accountability

¹ SBC Communications Inc. files these comments on behalf of itself and its operating company affiliates (collectively, "SBC") in response to the Commission's December 23, 2003, Second Further Notice of Proposed Rulemaking in the above-captioned docket. *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 26912 (2003) (*Second FNPRM*). Those affiliates are: Southwestern Bell Telephone Company LP; Nevada Bell Telephone Company; Pacific Bell Telephone Company; Illinois Bell Telephone Company; Indiana Bell Telephone Company; Michigan Bell Telephone Company; The Ohio Bell Telephone Company; Wisconsin Bell Telephone Company; and the Southern New England Telephone Company.

² Thus, for example, where the applicant failed to comply with the program rules, USAC and, if necessary, the Commission should seek reimbursement only from the applicant. If, on the other hand, the service provider was at fault, or complicit with the applicant, USAC could appropriately look to the service provider for reimbursement.

and provide appropriate incentives for all parties (applicants, service providers, and USAC itself) to comply with the program rules. It also will ensure that innocent parties are not held liable for the mistakes or fraud committed by other participants in the program. In addition, the Commission should establish procedures that provide parties notice and an opportunity to contest the recovery of funds, and ensure that innocent parties are made whole. Finally, the Commission cannot seek recovery of any more funds than those that were erroneously or improperly disbursed, except pursuant to the enforcement provisions of the Act.

II. BACKGROUND

In 1999, the Commission adopted an order directing USAC to adjust certain commitments of universal service discount funding to schools and libraries in violation of the 1996 Act, and to develop a plan for recovering any funding erroneously or improperly disbursed.³ The Commission also adopted a companion order waiving four rules where funding commitments were made or disbursed in violation of the Commission's rules, finding that the affected applicants and service providers may have reasonably relied on the funding commitments applicants received from USAC.⁴ The following year, the Commission issued an order adopting, with minor modifications, USAC's recovery plan, requiring USAC to recover funds erroneously or improperly disbursed from service providers either through cash repayment or offsetting amounts owed to the service provider from other valid commitments involving the same applicant and service provider in the same funding year.⁵ The Commission's sole justification for seeking repayment from service providers rather than applicants was that

³ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, FCC 99-291 (rel. Oct. 8, 1999) (*Comad Order*), petitions for recon. Pending, petition for review pending sub nom. *United States Telecom Ass'n v. FCC*, Case Nos. 00-1500, 00-1501 (D.C. Cir. Filed Nov. 27, 2000).

⁴ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 7197, para. 7 (1999) (*Waiver Order*).

⁵ *Changes to the Board of Directors of the National Exchange Carrier Association, Inc.; Federal-State Joint Board on Universal Service*, CC Docket Nos. 97-21 and 96-45, Order, 15 FCC Rcd 22975 (2000) (*Comad Implementation Order*).

“service providers actually receive disbursements of funds from the universal service support mechanism.”⁶ The Commission stated that, in instances of applicant error, it expected that service providers would recover from applicants (through offsets or otherwise) payments for funding amounts refunded to USAC by the service provider.⁷

III. DISCUSSION

A. The Existing Procedures are Inequitable and Should be Changed.

The Commission’s existing procedures for recovering erroneously or improperly disbursed e-rate funds only from service providers (even where they have complied fully with program rules) exalts form over substance, is inequitable and inefficient, and discourages service providers from participating in the program. As an initial matter, the mere fact that service providers, rather than applicants, “actually receive disbursements of funds” is beside the point. Irrespective of whether an applicant obtains e-rate funding through the BEAR or SPI process, it is the applicant, not the service provider, which applies for e-rate funding. It also is the applicant, not the service provider, to which e-rate funds are committed, and which actually receives the benefits of such funds. The service provider cannot retain any funds disbursed through the e-rate program, but rather must pass through those funds to the applicant (either through discounted service or through reimbursements). The service provider thus is merely the delivery vehicle or conduit for funding provided to the applicant, as the Commission itself implicitly has acknowledged.⁸ Consequently, it is the applicant, not the service provider, that owes a debt to the United States for any erroneously or improperly disbursed e-rate funds (except, perhaps, where the service provider has failed to comply with the e-rate rules). Because the applicant thus is the “debtor” for any e-rate funds erroneously or improperly disbursed, the Commission can and should seek recovery of such funds (either through demand or referral to

⁶ *Comad Order* at para. 8.

⁷ *Comad Implementation Order* at para. 13.

⁸ *Id.* (noting that, in instances of applicant error, service providers should recover from applicants (through offsets or otherwise) payments for funding amounts recovered from the service provider by USAC).

the Department of Justice) directly from the applicant – except where such funds were improperly disbursed due to service provider error.

Requiring a service provider to refund erroneously or improperly disbursed funds, regardless of whether the service provider was at fault or could have prevented the error, also is inefficient and patently inequitable. Looking to service providers for refunds forces service providers either to try to recover such funds from the applicant (which is likely to be costly and time-consuming, and could be impossible), or absorb the resulting loss due to repayment of those funds. In either case, the existing procedures increase the costs for all concerned, unfairly punish service providers for the mistakes of the applicant (or USAC), and provide applicants a windfall of e-rate discounts to which they are not entitled.

Moreover, the primary responsibility for compliance with the e-rate rules lies with the applicant. When an applicant seeks e-rate funding, a service provider must rely on the applicant to certify that it has complied with the rules. The service provider has no way of knowing whether the applicant's certification is correct or if the applicant and USAC have followed the rules and proper procedures. A service provider thus can only ensure compliance with its own obligations. In this instance, it is simply unfair to require refunds by the service provider for errors caused by the applicant or the Administrator.

Seeking recovery only from service providers, regardless of who is at fault, also fails to provide proper incentives for all program participants (including applicants and USAC itself) to exercise proper care in executing their responsibilities under the e-rate program. In SBC's experience, most refunds of e-rate disbursements are required due to applicant or USAC (not service provider) error. The existing procedures thus have failed to provide proper incentives for applicants and the Administrator to comply with the e-rate rules, contrary to the Commission's expectations.⁹ Only by seeking recovery from the applicant will the Commission provide appropriate incentives for all program participants to comply with the rules.

⁹ *Comad Implementation Order* at para. 13.

Requiring service providers to repay e-rate funds disbursed due to applicant or USAC error also will reduce incentives for service providers to bid on projects eligible for e-rate funding. In the end, this will reduce competition for e-rate contracts and increase the cost of e-rate projects, to the detriment of consumers (who ultimately bear the cost of the e-rate program) and applicants alike.

B. The Commission Should Adopt a Comprehensive Plan for Recovering Improperly Disbursed Funds.

The Commission should adopt a new, comprehensive plan for the recovery of funds erroneously or improperly disbursed that focuses on the party (or parties) that are responsible for, or benefited from, the disbursement. In particular, it should develop a plan based on the following principles:

- Funds generally should be recovered from the party responsible for, or that benefited from, the improper disbursement.
- No funds should be recovered when improperly disbursed due to errors of the Administrator.
- No funds should be recovered where recovery is not cost-effective.
- Recovery should be waived for rule violations that are minor or do not materially undermine the integrity or policies of the program.
- Parties should have an opportunity to contest recovery.

A recovery mechanism based on these principles will promote accountability and provide appropriate incentives for all parties (applicants and service providers alike) to comply with the program rules. It also will ensure that innocent parties are not held liable for the mistakes or fraud committed by other participants in the program.

Recovery from the Responsible Party. As discussed above, applicants have primary responsibility for complying with, and are the sole beneficiaries of, the e-rate program. Under the program, applicants are responsible for preparing and submitting forms (*i.e.*, FCC Forms 470 and 471) requesting funding, and providing a host of certifications regarding, among other things, the eligibility of the applicant and services for funding, the ability of the applicant to effectively use the supported services, and compliance with the competitive bidding process.

Neither of these forms provides for certifications by the service provider. Indeed, service providers are prohibited from assisting applicants in the preparation of Form 470 and have no role in the preparation of a schools Form 471, and thus have no way to prevent applicant errors. Because applicants are solely responsible for preparing funding requests, they should be held liable for reimbursing USAC for any funds improperly disbursed due to applicant errors.

Where a service provider fails to comply with the program rules, or engages in waste, fraud or other abuse, USAC and the Commission rightly could look to the service provider for the recovery of funds. In that case, even though the applicant ultimately receives the benefits of such funds, seeking recovery from the service provider will provide appropriate incentives to providers to comply with the program rules.

No Recovery Due to Administrator Error. Except, perhaps, where funds are disbursed in violation of the statute, neither an applicant nor a service provider should be liable to repay funds improperly disbursed due to Administrator error.¹⁰ Requiring applicants or service providers to repay in this instance not only would provide no incentives for USAC to exercise due care in carrying out its own duties under the program, it also would be unfair. In this instance, affected applicants and service providers ought to be able to rely on funding commitments made by USAC. Consequently, where funds are disbursed, or funding commitments are made, based solely on Administrator error, USAC and the Commission should not seek repayment of such

¹⁰ While the Commission may not waive statutory requirements (such as the requirement that only a carrier may receive reimbursement for discounted telecommunications services), it may forego recovery of funding disbursed in violation of the statute under certain circumstances. SBC notes in this regard that, under the Debt Collection Improvement Act, an agency is authorized to compromise a claim of the government of not more than \$100,000 (excluding interest) or such higher amount as the Attorney General may prescribe that has not been referred to another agency for further collection. 31 U.S.C. § 3711(a)(2). The Commission thus has authority to compromise claims (potentially by foregoing recovery altogether) for funds disbursed in violation of the statute that are below a certain amount.

funds, and the Administrator should fulfill any outstanding commitments.¹¹ If the Commission nevertheless requires a refund in this instance, it should obtain recovery from the applicant, which received the benefits of the improperly disbursed funds.

No Recovery Where Recovery is not Cost-Effective. Under the Debt Collection Improvement Act, agencies are specifically authorized to suspend or end collection on a claim when, among other things, “the cost of collecting the claim is likely to be more than the amount recovered.”¹² Because the purpose of recovering funds wrongly disbursed is to make the fund whole, USAC and the Commission should not pursue recovery where doing so would cost more than the amount likely to be recovered. In contrast, recovery is appropriate where the amount recovered likely would exceed the cost of recovery (even if the amount recovered is only a small percentage of the total amount disbursed for a particular project).

Recovery Should be Waived for Minor Rule Violations. The Commission should waive recovery of funds wrongly disbursed due to minor rule violations that do not affect the integrity of or otherwise materially undermine policies central to administration of the program. The e-rate program is enormously complex, with new rules and procedures regularly being adopted to promote program integrity. In many instances, these new rules and procedures are adopted when audits reveal errors caused by confusion on the part of applicants and/or service providers regarding program requirements. Where these errors do not directly affect program integrity or materially undermine policies central to the program, the Commission should waive recovery. Additionally, when the Commission identifies errors or other circumstances applicable to

¹¹ SBC notes that, in the *Waiver Order*, the Commission waived its funding rules based largely on the fact that applicants and providers “may have reasonably relied on the funding commitments received from USAC.” *Waiver Order* at para. 7.

¹² 31 U.S.C. § 3711(a)(3). These provisions are incorporated into the Commission’s rules governing the collection of debts owed to the United States. 47 C.F.R. § 1.1915.

multiple program participants for which it is appropriate to waive recovery, the Commission should authorize the Administrator to waive recovery for all like circumstances.

Opportunity to Contest Recovery. The Commission also should adopt procedures to provide parties from whom USAC seeks to recover funds an opportunity to contest recovery. Under these procedures, USAC should first identify the party from whom it should seek recovery. In particular, it should determine whether the service provider already has begun to deliver discounted services to the applicant, and whether funds were disbursed erroneously or improperly due to service provider error. Where a service provider has not yet begun to deliver services, USAC could simply adjust the funding commitment and notify both the applicant and service provider accordingly. Where the service provider has begun service delivery, but is at fault, USAC should send a notice to the service provider identifying the error and the amount by which USAC proposes to adjust the funding commitment or which USAC proposes to recover from the service provider. Unless the service provider contests the commitment adjustment or recovery of funds within a reasonable period of time, USAC should adjust the funding commitment or (as appropriate) either bill the service provider directly or offset future payments to the service provider to recover amounts wrongly disbursed.

If USAC determines that the service provider has begun service delivery and is not at fault, it should pursue recovery directly from the applicant. If the applicant is using the SPI process to obtain funding for discounted service, USAC should not reduce the funding commitment without providing notice to the service provider. Such notice should inform the service provider that USAC has identified an applicant error requiring commitment adjustment, and provide the service provider an opportunity to submit invoices to USAC for discounted services already delivered pursuant to the outstanding funding commitment. USAC then should pursue recovery for all amounts disbursed from the applicant. This procedure is necessary to ensure that innocent service providers, which should be entitled to rely on funding commitments issued by USAC, can be made whole by recovering funds for all services delivered prior to

notice of a commitment adjustment.¹³ Where USAC seeks recovery from the applicant, it reasonably could withhold action on any further request for funding from that applicant in order to facilitate collection of outstanding debts and to protect the fund.

C. The Commission Cannot Seek Recovery of More Than Amounts Incorrectly Disbursed.

The Commission asks whether a pattern of systematic noncompliance with Commission rules warrants a recovery of the full amount disbursed, irrespective of the amount of funding erroneously or improperly disbursed. It does not. Were the Commission to pursue recovery of more than amounts wrongly disbursed, it would by definition seek recovery of funds committed and disbursed in accordance with the Commission's rules. Recovery of such funds thus would amount to a penalty for "systematic" noncompliance with the rules. While there may be circumstances in which enforcement action against a program participant is warranted in order to promote program integrity and protect against waste, fraud and abuse, any such action must comply with the procedural and substantive requirements of the Communications Act.

The Communications Act establishes detailed procedural and substantive requirements that the Commission must follow before it can assess any penalties. The Commission cannot disregard these requirements and create new penalty schemes with no basis in the Act, especially since those limits are grounded in fundamental principles of due process. To the extent the Commission believes action beyond recovery of funds wrongly disbursed is appropriate due to a pattern of systematic noncompliance with program rules, it must follow existing enforcement procedures.

If the Commission determines that it has authority to recover more than amounts wrongly disbursed outside the enforcement process, which it does not, it should establish procedures modeled on the debarment process to protect the due process rights of affected parties.

¹³ To the extent USAC determines it is appropriate to reduce funding commitments to, rather than seeking recovery of funds from, an applicant, it must work closely with the service provider to ensure that the commitment is not reduced to the point that the service provider would be unable to obtain reimbursement for discounted services provided to the applicant prior to receiving notice that USAC intends to adjust the funding commitment.

Specifically, the Commission first should determine whether cause exists for seeking full recovery of disbursed funds due to willful or repeated failure to comply substantially with program rules. If so, the Commission should notify the affected entity in writing that it intends to pursue recovery of the full amount of disbursed funds, and the reasons why. The affected entity should have an opportunity to contest such action through submission of a written response and relevant documentation. The Commission should issue a formal written decision within a specified period of time resolving the matter.

IV. CONCLUSION

The Commission should develop a new, comprehensive plan for the recovery of funds erroneously or improperly disbursed that focuses on the party (or parties) that are responsible for, or benefited from, the disbursement. The Commission also should establish procedures that provide parties notice and an opportunity to contest the recovery of funds, and ensure that innocent parties are made whole. Finally, the Commission should not seek recovery of any more funds than those that were erroneously or improperly disbursed.

Respectfully submitted,

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